FILED
JAN 19 2006
OFFICE OF THE CLERK

No. 05-260

In The

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110

WILLIAM DELGADO
JASON H. WILSON
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Blvd.
Los Angeles, CA 90017

PETER K. STRIS
Counsel of Record
RADHA A. PATHAK
WHITTIER LAW SCHOOL
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141; x 460

JOHN C. STEIN
THE BOCCARDO LAW FIRM LLP
111 W. St. John St.; Ste. 400
San Jose, CA 95113

**additional counsel listed on inside cover*

Counsel for Petitioners

ALISON L. LACROIX
SAMUEL I. GOLIEB FELLOW
IN LEGAL HISTORY
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square S.
New York, NY 10012

QUESTION PRESENTED

Can a plan fiduciary bring a civil action against a plan participant to obtain "appropriate equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3), where a term of the plan requires the participant to reimburse medical expenses advanced by the plan if the participant recovers money from a third-party tortfeasor and possesses such payments in an identifiable fund?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF CITED AUTHORITIES iii
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
RELEVANT STATUTORY PROVISION 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 9
ARGUMENT 10
THE REIMBURSEMENT AWARD IS NOT "APPROPRIATE EQUITABLE RELIEF". 10
A. Section 502(a)(3) of ERISA Only Authorizes a Court to Award "Equitable Relief." 12
B. The Fourth Circuit Erred In Characterizing the District Court's Award as "Equitable Restitution." 17
C. The District Court's Award Is Not Another Form of "Equitable Relief" 24
1. Equitable lien by contractual agreement. 24
2. Subrogation. 28
D. Even If It Is "Equitable Relief," the District Court's Award Is Not "Appropriate". 30
CONCLUSION 35

TABLE OF CITED AUTHORITIES

Cases *Page*

Bassett v. City Bank & Trust Co., 165 A. 557 (1933).....26

Gaines v. Miller, 111 U.S. 395 (1884).....22

Great-West Life & Annuity Insurance v. Knudson, 534 U.S. 204 (2002)..... *passim*

Klass v. Twin City Fed. Sav. & Loan Ass'n, 291 Minn. 68, 190 N.W.2d 493 (1971).....22

Mertens v. Hewitt, 508 U.S. 248..... *passim*

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985).....9, 11

Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 104 (CA2 2005).....9

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).....12

Qualchoice v. Rowland, 367 F.3d 638 (CA6 2004).....29

Taylor v. Wharton, 43 App. D.C. 104, 1915 WL 20927 (App. D.C. Feb 01, 1915).....26

Statutes

29 U.S.C. § 1132(a) ..... *passim*

Restatements

Restatement (Second) Contracts (1981) 15

Restatement of Restitution (1937) 22, 23

Restatement (Second) of Trusts (1959) 20

Treatises *Page*

Black's Law Dictionary (7th Ed.).....29

A. Corbin, Contracts (1964).....15

D. Dobbs, Law of Remedies (2d ed. 1993)..... *passim*

Other Authorities

Roger M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement To ERISA Plans: It's Time To Recognize The Elephant In The Courtroom*, 55 Mercer L. Rev. 595 (2004).....28, 32, 34

Page

John P. Dawson, *Restitution or Damages?* 20 Ohio St. L.J. 175 (1959).....23

Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577 (2002).....21, 22, 23

Malcolm D. Talbott, *Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies*, 20 Ohio St. L.J. 320 (1959).....9

Comment, Legal Reimbursement Claims by ERISA Plan Fiduciaries, 72 U. Chi L. Rev. 103 (2005) 27

Note, *Adding Insult to Injury, ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214 (2005) 26

Briefs

Brief of *Amicus Curiae* in Support of the Judgment Below by Invitation of the Court, 2001 WL 740878, filed in *Great-West Life & Annuity Insurance v. Knudson*, 534 U.S. 204 (2002).....31

BRIEF FOR PETITIONERS

Petitioners Joel and Marlene Sereboff respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") be reversed.

OPINIONS BELOW

The opinion of the Fourth Circuit (PA 1a-19a)[1] is published at 407 F.3d 801. The order of the district court granting summary judgment in favor of respondents (PA 24a-45a) is published at 303 F. Supp. 2d 691. The order of the district court granting attorneys' fees (PA 20a-23a) is published at 316 F. Supp. 2d 265. The order denying a timely petition for rehearing and suggestion for rehearing *en banc* (PA 46a-47a) is unreported.

STATEMENT OF JURISDICTION

The Fourth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* on June 1, 2005. A petition for a writ of certiorari was granted on November 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 502 of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

---

[1] References to "PA ----" are to the appropriate pages of the appendix to the petition for a writ of certiorari. References to "JA ---" are to the appropriate pages of the Joint Appendix.

(a) Persons empowered to bring a civil action.

A civil action may be brought—

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . . .

* * * *

STATEMENT OF THE CASE

At all times relevant to this action, petitioners Joel and Marlene Sereboff (hereinafter "Petitioners" or the "Sereboffs") have been participants in the MAMSI Life and Health Insurance PPO Plan (hereinafter, the "Plan"). PA 36a-37a ¶¶1, 8. The Plan is a self-funded employee welfare benefit plan covered by the Employee Retirement Income Security Act of 1974 (hereinafter, "ERISA"). PA 37a ¶9. It is administered by fiduciary Mid Atlantic Medical Services, Inc. (hereinafter, "MAMSI") and sponsored by Ms. Sereboff's employer. PA 36a ¶¶1, 3.

I. The Accident and Plan Payments.

On June 22, 2000, the Sereboffs were injured in an automobile accident in California. PA 36a ¶¶4, 5. In connection with the injuries suffered by the Sereboffs in this accident, the Plan advanced a total of $74,869.37 to cover the medical expenses for their accident-related injuries. PA 37a ¶10.

The Plan contains an "Acts of Third Parties" provision, which states in part:

> This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the Company's right to recover any payments made to you [] by a third party. . . because of an injury or illness caused by a third party. . . . If you [] receive[] benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party [] must be used to reimburse the Company.

The provision is set forth in its entirety at PA 38a-39a ¶11 and JA 35-36, and JA 74-75.

II. The State Court Tort Lawsuit and Settlement.

On August 11, 2000, the Sereboffs filed a personal injury lawsuit in California against various third-parties. PA 39a, ¶12; JA 77-86 (the complaint).

On October 18, 2000, the Sereboffs' trial counsel, Jack Stein, received two form letters from MAMSI. JA 87-90. These letters—one regarding each of the Sereboffs—stated that:

> MAMSI [ ] has been advised that you have been retained to represent the referenced member in connection with claims for personal injuries which arose through the negligence of a third party. . . . This letter is to give written notice of MAMSI[]'s subrogation lien for medical bills processed on behalf of our member. . . . MAMSI [] would like to offer you the opportunity to assert our lien. . . . Your immediate attention is requested, *otherwise we will be compelled to retain counsel to pursue recovery of our lien. . .*

JA 87-90 (emphasis added).

On December 6, 2000, Mr. Stein was sent another form letter by MAMSI. JA 95-96. Except for the date, this was the same form letter that MAMSI had sent previously, *see* JA 87-90, offering Mr. Stein the opportunity to represent MAMSI in state court. As before, this letter stated that "[y]our immediate attention is requested, *otherwise we will be compelled to retain counsel to pursue recovery of our lien...*" JA 88, 90, 96 (emphasis added).

On April 13, 2001, Mr. Stein and Ms. Sereboff both received a letter from MAMSI. JA 104-108. This letter purported to be a "formal demand" by MAMSI that Ms. Sereboff "endorse[] the enclosed lien." JA 105, 107.

On April 24, 2001, Mr. Stein responded to MAMSI's April 13, 2001 letter. JA 108-110. In this letter, he informed MAMSI that he did not believe that it was entitled to reimbursement, citing four Ninth Circuit Court opinions. PA 42a, ¶22. In his letter, Mr. Stein noted that he "would be happy to discuss this with you after you have had an opportunity [to] review the Points and Authorities which I have supplied." JA 109.

On May 7, 2001, Mr. Stein received another form letter from MAMSI. JA 110-112. Except for the date and the notation of "SECOND REQUEST", this was the same form letter that MAMSI had sent almost seven months previously, *see* JA 87-90, offering Mr. Stein the opportunity to represent MAMSI in state court. As before, this letter stated that "[y]our immediate attention is requested, *otherwise we will be compelled to retain counsel to pursue recovery of our lien...*" JA 111 (emphasis added).

On May 23, 2001, Mr. Stein received a letter from MAMSI responding to his April 24, 2001 letter. JA 116-117. On May 30, 2001, Mr. Stein responded to this letter. JA 117-118. In his response, Mr. Stein stated:

> If you believe that MAMSI is entitled to collect monies out of this litigation, I would suggest that you retain counsel in California to protect your interests since under California law I do not believe that I can represent MAMSI and my client at the same time. . . If you believe strongly that you are entitled to this reimbursement, then the lawyer who you retain would be able to protect

> your interests in litigating here in California and could negotiate separately with the defendants for reimbursement of all monies paid by you.

JA 118; PA 43a ¶27.

On June 7, 2001, Mr. Stein wrote again to MAMSI, that "[f]ollowing your verbal request of June 7, 2001, I am enclosing a copy of the Sereboff [state court] complaint." JA 119; PA 43a ¶28.

Approximately one and a half years later (in January of 2003),[2] the Sereboffs' state court action settled in full for $750,000. PA 44a ¶34; JA 139-143. On March 12, 2003, MAMSI contacted the Sereboffs to request payment of the $74,869.37 that it had paid on their behalf. PA 45a ¶¶35-36; JA 134-136. On March 20, 2003, Mr. Stein responded to MAMSI reiterating his opinion that MAMSI's asserted liens were not collectable. PA 45a ¶38, JA 136-138.

III. This Litigation.

On August 5, 2003, MAMSI filed suit in federal court seeking reimbursement under section 502(a)(3) of ERISA. JA 3-4, 33-40 (MAMSI's verified complaint). As Mr. Stein had *already* distributed the settlement proceeds to the Sereboffs by this point, MAMSI sought a temporary restraining order and preliminary injunction to

---

[2] After the September 11 attacks, a number of the defendants in the state court lawsuit went into bankruptcy. As such, the litigation was stayed on three occasions to exclude them from further participation, but allowing the Sereboffs to go forward against the remaining defendants. PA 37a ¶7.

require the Sereboffs to retain at least $74,869.37 from the settlement proceeds. JA 4; 41-43 (Motion); 44-56 (Memorandum in Support); 57-61 (Proposed Order).

On August 26, 2003, the district court approved a stipulation between the parties, which provided that:

> Defendants Joel Sereboff and Marlene Sereboff shall preserve $74,869.37 of the settlement funds recovered because of injuries sustained on or about June 22, 2000, which are currently held in investment accounts, (and must keep the settlement funds in those investment accounts) until the Court rules on the merits of this case and all appeals, if any are exhausted;

JA 69; 5.

Shortly thereafter, MAMSI and the Sereboff entered into a joint stipulation of facts. PA 36a-45a (Joint Stipulation of Facts); JA 71- 143 (the 27 exhibits attached to the Joint Stipulation). MAMSI then filed a motion for summary judgment, JA 7, and the Sereboffs filed a motion to dismiss, JA 7-8. Both motions turned entirely on whether MAMSI was entitled to seek reimbursement under § 502(a)(3) of ERISA out of the funds being preserved in the Sereboffs' investment accounts.

In January of 2004, the district court issued an opinion denying the Sereboffs' motion to dismiss and

granting MAMSI's motion for summary judgment.[3] JA 10-11; PA 24a-33a. The district court also entered an order, which stated in pertinent part that:

> ON OR BEFORE FEBRUARY 9, 2004, DEFENDANTS JOEL SEREBOFF and MARLENE SEREBOFF SHALL PAY OVER TO PLAINTIFF OR ITS DESIGNEE THE PRINCIPAL SUM OF $74,869.37, TOGETHER WITH INTEREST AT THE LEGAL RATE OF SIX PERCENT PER ANNUM DATING FROM MARCH 12, 2003
>
> . . .
>
> IN ACCORDANCE WITH THE TERMS OF THE MAMSI LIFE AND HEALTH INSURANCE PPO, THE AMOUNT PAYABLE BY DEFENDANTS TO PLAINTIFF SHALL BE REDUCED BY PLAINTIFF'S *PRO RATA* SHARE OF "REASONABLE ATTORNEY FEES AND COURT COSTS". . . .

PA 34a-35a. In May of 2004, the district court issued a separate opinion and order granting MAMSI's request for attorneys' fees. PA 20a-22a

The Sereboffs appealed both orders. The Fourth Circuit affirmed the first order (i.e., the Reimbursement Award) but reversed the second order regarding

---

[3] The granting of MAMSI's motion was only partial because the court, against MAMSI's urging, reduced the reimbursement amount by MAMSI's pro rata share of reasonable attorney fees and court costs. PA 32a.

attorney's fees. PA 1a-19a. The Sereboffs timely filed a petition for rehearing and suggestion for rehearing *en banc* which was denied on June 1, 2005. PA 46a-47a.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the ERISA statute authorizing fiduciaries such as MAMSI to sue plan beneficiaries for "appropriate equitable relief" does not authorize "legal" actions for the recovery of money damages. *Great-West Life & Annuity Insurance v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt*, 508 U.S. 248; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

The relief that MAMSI requested in this case, however, is nothing more than compensatory damages for breach of contract—a classic action at law. Although MAMSI argued that it was seeking "equitable restitution," the courts below should have, but failed to, "decline th[e] invitation to perceive equitable clothing where the requested relief is nakedly contractual." *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 104 (CA2 2005).[4]

---

[4] To be clear, however, Petitioners' do *not* contend that this lawsuit seeks legal relief *merely* because MAMSI's rights derive from a contract and the plan seeks money. Petitioners acknowledge that a breach of contract may occasionally entitle a plaintiff to seek "equitable relief" in the form of money. *See e.g.*, Malcolm D. Talbott, *Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies*, 20 Ohio St. L.J. 320, 326 (1959) ("[T]he equitable remedies of constructive trust and equitable lien are granted in simple breach of contract cases *in limited areas to give specific restitution of property or to secure an*

In its opposition to the petition for certiorari, MAMSI seems to suggest alternate theories, not considered by the courts below, as to why the relief it was granted is equitable in nature. Just as before, however, these alternate theories advanced by MAMSI fail to satisfy the historical test mandated by this Court in *Knudson*.

ARGUMENT

THE REIMBURSEMENT AWARD IS NOT "APPROPRIATE EQUITABLE RELIEF"

This lawsuit was brought by MAMSI in federal court under § 502(a)(3) of ERISA. Section 502(a)(3) authorizes the fiduciary of an ERISA plan to bring a civil action to enjoin any act which violates the terms of a plan or "to obtain other appropriate equitable relief" to enforce a plan's provisions. 29 U.S.C. § 1132(a)(3).

It is well-settled law that the phrase "equitable relief" in § 502(a)(3) limits those lawsuits that may be brought under the statute to those seeking a category of relief (*e.g.*, injunction, restitution) that would have been "typically available in equity." *See Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (hereinafter, "*Mertens*"). In order to satisfy § 502(a)(3), however, it is not enough for a plaintiff to merely request a category of relief that would have been typically available in equity. This Court has made clear that—in evaluating whether a particular

---

interest in specific property, however, this is done reluctantly by the courts.") (emphasis added) (hereinafter, "*Restitution in Contract*").

civil action is authorized by § 502(a)(3)—a federal court must look not only at the category of relief requested but also to the historical context in which such relief would have been available in a pre-merger court of equity. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (hereinafter, "*Knudson*"). In other words, a plaintiff may not evade the limits of § 502(a)(3) merely by seeking a remedy that can be considered an equitable remedy. Rather, the plaintiff may bring a suit pursuant to § 502(a)(3) only if it seeks an equitable remedy *and* the remedy is one that would historically have been granted under identical or analogous circumstances by a pre-merger court of equity.

Attempting to satisfy the strict requirements of § 502(a)(3), MAMSI requested various categories of relief (*i.e.*, restitution by way of a constructive trust) that were "typically available in equity". This is nothing more than artful pleading. MAMSI's position—like the decisions below—ignores this Court's mandate in *Knudson* that an equitable remedy is subject to "the limitations upon its availability that equity typically imposes." *Knudson*, 534 U.S. at 211 n.1. Put simply, pre-merger courts of equity would never have classified MAMSI's attempt to obtain money to fulfill a contractual reimbursement obligation as one that qualified for equitable relief.[5]

---

[5] As the court below observed, "[i]n disputes where 502(a)(3) does not expressly authorize relief, the federal courts are not empowered to award it." PA 8a. *Cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The six carefully integrated civil enforcement provisions found in section 502(a) of the

A. Section 502(a)(3) of ERISA Only Authorizes a Court to Award "Equitable Relief".

For well over a decade, it has been settled that § 502(a)(3) of ERISA only authorizes civil actions seeking "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256 (emphasis in original).

In *Mertens*, this Court addressed whether § 502(a)(3) authorized a lawsuit for money damages by ERISA plan beneficiaries against a third party who participated knowingly in the plan fiduciaries' breach of their fiduciary duties. Although "[m]oney damages are, of course, the classic form of *legal* relief," *id.* at 255, the *Mertens* petitioners—supported by the United States as *amicus curiae*—argued that they sought "equitable relief" under § 502(a)(3) because, "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Id.* (citations omitted). In other words:

> "[A]lthough a beneficiary's action to recover losses resulting from a breach of duty superficially resembles an action at law for

---

statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.").

> damages," the Solicitor General suggest[ed that], "such relief traditionally has been obtained in courts of equity" and therefore "is, by definition, 'equitable relief.'"

Id. (quoting Brief for United States as *Amicus Curiae* 13-14).

Over a dissent on this precise point, this Court explicitly rejected the Solicitor General's argument:

> In the context of the present statute, we think there can be no doubt. Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous.

Id. at 257. In other words, the *Mertens* Court made clear that the relevant inquiry for purposes of § 502(a)(3) is not simply whether the plaintiff is seeking a remedy that can be classified as equitable, and it rejected the position that a plaintiff can evade the limits of § 502(a)(3) merely by pointing to *some* remedy that a pre-merger court of equity *might* have awarded in *some* broad category of cases to which plaintiff's case belongs.

The *Mertens* Court noted, in dicta, that certain remedies such as an injunction and restitution were "typically available in equity." *Mertens*, 508 U.S. at 256.

This Court clarified in *Knudson*, however, that such remedies were not *always* "typically available in equity" and, thus, remediable under § 502(a)(3). *Knudson*, 534 U.S. at 211 n.1. In particular, the Court held that that a remedy would only qualify as "equitable relief" under § 502(a)(3) if the conditions that a pre-merger equity court attached to its provision were present in the case at bar. A brief examination of the facts of *Knudson* is instructive:

Janette Knudson was rendered quadriplegic by a car accident. *Id.* at 207. At the time of the accident, she was covered by a health and welfare plan run by her husband's employer. *Id.* As required by the relevant plan documents, substantial medical expenses were paid on Ms. Knudson's behalf by the plan and its insurer (collectively, the "Great West Petitioners"). *Id.* The Knudsons then sued several alleged third-party tortfeasors in California state court and ultimately settled the lawsuit for an amount in exeess of the medical benefits paid by the Great West Petitioners. *Id.* at 207-08. Although the plan documents included a provision that imposed certain reimbursement obligations on Ms. Knudson, a dispute emerged regarding the precise amount of the reimbursement obligation. *Id.* at 208.

Ultimately, the Great West Petitioners sued the Knudsons in federal court seeking to enforce the contractual reimbursement provision contained in the plan. *Id.* The sole object of that federal lawsuit was to obtain money to which the Great West Petitioners

claimed entitlement under the plan (*i.e.*, a contract).[6] Nonetheless, the Great West Petitioners maintained that their lawsuit was authorized by § 502(a)(3) because they sought to enforce their monetary reimbursement claim by requesting two categories of relief (injunction and restitution) that were explicitly identified in *Mertens* as "typically available in equity." *Id.* at 210-218.

First, the Great West Petitioners argued that they were "entitled to relief under § 502(a)(3)(A) because they [sought] 'to enjoin a[n] act or practice'—respondents' failure to reimburse the Plan—'which violates ... the terms of the plan.'" *Knudson*, 534 U.S. at 210. Despite the fact that an "injunction" had specifically been identified in *Mertens* as a category of relief that was "typically available in equity," *Mertens*, 508 U.S. at 256, the *Knudson* Court rejected the argument that the *particular* injunction sought by the Great West Petitioners satisfied the *Mertens* test. As the Court noted, "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Knudson*, 534 U.S. at 210-11 (citing 3 Restatement (Second) of Contracts § 359 (1979); 3 D. Dobbs, Law of Remedies § 12.8(2), at 199 (2d ed. 1993) (hereinafter, "Dobbs"); 5A A. Corbin, Contracts § 1142, p. 119 (1964) (hereinafter, "Corbin")) (footnote omitted).

---

[6] "[B]y the act of accepting benefits, a beneficiary generally becomes contractually bound to the clear terms on which they were offered." Restatement (Second) Contracts §§ 56, 59 (1981).

Second, the Great West Petitioners argued that § 502(a)(3)(B) authorized them to seek restitution to remedy the alleged unjust enrichment that Ms. Knudson received by refusing to honor her contractual reimbursement obligation. Despite the fact that "restitution" had specifically been identified in *Mertens* as a category of relief that was "typically available in equity," *Mertens*, 508 U.S. at 256, the *Knudson* Court concluded that the *particular* restitution sought by Great West was not "equitable." *Id.* at 214. The Court observed that:

> not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought.

Id. at 213 (citations omitted).

In sum, *Knudson* makes clear that, in assessing whether a claim is remediable under § 502(a)(3), a federal court must look not only at the category of relief sought but also at the historical context in which such a remedy would have been available in a pre-merger court of equity. *Knudson*, 534 U.S. at 216 (an "approach[] which looks only to the nature of the relief and not to ***the conditions that equity attached to its provision***, logically

leads to [a] conclusion [that] renders the statute's limitation of relief to '[injunction] ... or other appropriate equitable relief' utterly pointless.") (emphasis added).[7]

B. The Fourth Circuit Erred In Characterizing the District Court's Award as Equitable Restitution.

The district court and Fourth Circuit in this case both characterized MAMSI's suit as one for "equitable restitution." This conclusion is inappropriate in light of the historical understanding of this remedy. Equitable restitution—placed within a proper historical context—simply is not available to MAMSI here.

The district court in this case held that MAMSI could obtain monetary reimbursement from the Sereboffs under § 502(a)(3) because MAMSI was seeking equitable restitution as defined by this Court in *Knudson*. The court's opinion reasoned as follows:

> *Knudson* provided some critical *obiter dicta* in delineating the circumstances under which an ERISA fiduciary's claim falls on the "equity" or "law" side of the often fuzzy line separating the two forms of monetary relief encompassed by the term restitution: . . .

---

[7] *See also id.* at 211 n.1 ("[I]njunction is inherently an equitable remedy, . . . and statutory reference [in 502(a)(3)] to that remedy must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes. Without this rule of construction, a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." (citations omitted).

> [The court proceeded to quote at length from *Knudson*, 534 U.S. at 213-15]. . . .
>
> Manifestly, in the case at bar, plaintiff (an ERISA fiduciary) seeks to recover funds that (1) are "specifically identifiable" (because they were paid to the Sereboffs and their attorney on behalf of the tortfeasors causing their injuries, and the specific portion claimed by plaintiff has been separated from the balance of those funds); (2) "belong in good conscience to the Plan" (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident); and (3) "are within the possession and control of the defendant beneficiary" because the Sereboffs and their attorney received the funds in hand and the Sereboffs have segregated the claimed monies in an investment account to abide the result of this lawsuit."

PA 28a-31a. As such, the court granted MAMSI's motion for summary judgment for monetary reimbursement. The court denied MAMSI's motion to the extent that it attempt to avoid a deduction for the Sereboffs' attorneys fees and litigation expenses. PA 34a-35a.

On appeal, the Fourth Circuit repeated the district court's cursory analysis, *see* PA 11a-12a, and held that

"the action pursued by MAMSI, and resulting in the Reimbursement Award, is equitable in nature under 502(a)(3), and the court properly granted relief with respect to it." *Id.* at 12a.

Neither the district court nor the Fourth Circuit turned to standard treatises or any other historical sources in evaluating whether MAMSI did, in fact, seek relief that was "typically available in equity." Instead, the courts merely identified distinctions from, or circumstances that did not exist in, *Knudson*, and from that, concluded that the relief sought must be authorized by § 502(a)(3). By failing to consider whether the relief MAMSI sought would typically have been available in a pre-merger court of equity, the courts below ignored *Knudson's* mandate. Proper application of the historical inquiry required by *Knudson* reveals that MAMSI's lawsuit does not seek relief that was typically remediable in equity.

As explained by Professor Dobbs, in order to obtain a constructive trust or equitable lien, the ability to trace the plaintiff's funds is critical:

> [t]he plaintiff must trace his money or property to some particular funds or assets. Especially when the defendant has taken money, tracing is difficult. In such cases the plaintiff can often prove that the money was taken, but has difficulty in identifying that money with funds in the defendant's accounts. . . . ***If the tracing is incomplete, the rule that requires a res is invoked and the constructive trust is denied,***

> ***with the result that the defendant is only a simple debtor.***

1 Dobbs § 4.3(2), at 593 (emphasis added); *see also* 2 Dobbs § 6.1(2), at 7-8 ("In all cases, however, the trust or lien is invoked only when there is a specific res—***either the funds taken from the plaintiff or property the wrongdoer has exchanged for those funds***.) (emphasis added); *see also* Restatement (Second) of Trusts § 202 (vol. 1 at 444) (1959) ("Following Trust Property Into Its Product") (where trustee acquires property by wrongful disposition of trust assets, the acquired property may be subjected to a constructive trust or equitable lien only if it is "the product of the trust property" and "can be traced").

In this case, MAMSI's claim is *not* for return of particular money that the Plan paid to the Sereboffs and that the Sereboffs still retain. There is absolutely no evidence in the record that any Plan money was ever paid to the Sereboffs, as opposed to providers of their medical services. *See e.g.*, JA 35, 45, 58 (noting that "the Plan paid medical benefits ***on behalf of*** the Sereboffs). Moreover, any money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking, therefore, is not the return of Plan money or profits from its use or exchange.

Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.[8]

The district court's assertion that the funds in question "'belong in good conscience to the Plan' (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident)" is perhaps true as a matter of fairness. Mere fairness, however, is the wrong criteria by which to judge if a remedy was "typically available in equity." In the words of one scholar,

> "the entire subject of restitution" is 'equitable' in the sense that fairness considerations drive whether the plaintiff is entitled to restitution. At the same time, it is important to recognize that restitution has roots in both the courts of law and the courts of equity, ***with well-established rules indicating which claims are legal and which are equitable.***

Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577, 1606 (2002) (footnote omitted) (emphasis added) (hereinafter, "*Monetary Restitution*").

Whether or not funds "belong in good conscience" to another, the ability to seek restitution of those funds—absent the tracing described above—was not "typically

---

[8] Notably, this is money that MAMSI could have sought directly had it intervened as a subrogee in the Sereboffs state court action.

available at equity." *See Gaines v. Miller*, 111 U.S. 395, 397 (1884) (equitable relief denied, explaining: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by *assumpsit* for money had and received [citations omitted]. The remedy at law is adequate and complete.");[9] 1 Dobbs § 4.1(1), at 556 (Restitution claims for money are usually claims "at law."); Murphy, *Monetary Restitution*, 55 SMU L. Rev. at 1603 ("With respect to the particular context of a restitutionary claim for money, the plaintiff historically has had to assert the claim at law.") (footnote omitted).[10]

---

[9] "The count [of money had and received] includes money paid by a third person, so long ***as the money in good conscience belongs to the plaintiff***." 1 Dobbs § 4.2(3), at 582 (citing *Klass v. Twin City Fed. Sav. & Loan Ass'n*, 291 Minn. 68, 70, 190 N.W.2d 493, 494 (1971)) (emphasis added)

> In *Klass*, a tenant, in addition to fixed rental, agreed to pay the lessor all the taxes on the property. The property was eventually condemned by a housing authority. In the condemnation award, an allowance was made to the owner-lessor to reimburse him for taxes he had paid on the property and for which th authority had the benefit. The tenant sued to recover the sum allowed as taxes, on the ground that in equity and good conscience that share of the recovery belonged to him. The recovery was allowed, with the statement that 'cases dealing with unjust enrichment on money had and received support recovery in this situation.'"

Id.

[10] Although not applicable to this case, there are a limited set of other circumstances where monetary restitution was available at equity, *e.g.*, in certain cases against insolvent defendants (*see* Restatement of Restitution § 160 cmt. e (1937) ("Where . . . the payee is insolvent, the payor can maintain a suit in equity for the

The fact that the funds are "specifically identifiable" and "within the possession and control of the defendant beneficiary" does not change this analysis. "Even if the plaintiff can identify as his a particular fund of money held by the defendant, the plaintiff generally cannot recover the money in a suit in equity because the legal remedy is deemed adequate." Murphy, *Monetary Restitution*, 55 SMU L. Rev. at 1604 (footnote omitted). Put simply, MAMSI has not asserted a claim to specific property within the limited class of traditional equitable remedies for restitution. And despite MAMSI's attempt to dress the relief it seeks in "equitable" language, the object of this lawsuit is "in essence, to impose personal liability on [the Sereboffs] for a contractual obligation to pay money—relief that was not typically available in equity." *Knudson*, 534 U.S. at 210.[11]

---

specific recovery of the money paid by mistake, if the payee still holds it, since the money is held upon a constructive trust for him.")); against a fiduciary who has violated his duty (*see* Restatement of Restitution § 197 (1937) ("Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary.")).

[11] *Cf* John P. Dawson, *Restitution or Damages?*, 20 Ohio St. L.J. 175, 191 (1959) ("Under existing doctrines it is only through extension of quasi-contract restitution that reimbursement can be given for "requested" action, but as the gain to the promisor is reduced toward zero so that the claim is stripped down to the promisee's loss, it becomes harder to view it as anything more than a damage action for breach of a promise assumed to be unenforceable by damage action or otherwise.")

C. The District Court's Award Is Not Another Form of "Equitable Relief."

In its brief in opposition to the petition for a writ of certiorari (hereinafter, "Opposition" or "BIO"), MAMSI hints at two theories of why its claims are "equitable" that were not considered by the courts below. Neither theory is sufficient to justify the district court's award under § 502(a)(3).

1. Equitable lien by contractual agreement.

In its Opposition, MAMSI observes that:

> [a]s the United States has noted, "[t]his Court has long recognized that a *contractual* obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity. *Barnes v. Alexander*, 232 U.S. 117, 121-123 (1914); *Wylie v. Coxe*, 56 U.S. 415, 420 (1854). The same rationale applies here.

BIO at 13. It is true that an equitable lien can be imposed as a matter of contract, as opposed to the form discussed above.[12] As a matter of contract, an equitable lien may be:

---

[12] "The term 'equitable lien' is used in at least two fairly disparate senses. . . The equitable lien when imposed, ***not as a matter of contract***, but to prevent unjust enrichment, is essentially a special, and limited, form of the constructive trust. The lien is imposed for reasons that, in principle, are the same as those that warrant the constructive trust, and it works in substantially the same

> created by express or at least implied-in-fact agreement of the parties, as where a borrower agrees that a certain fund or piece of property will stand as security for his debt. Such liens are 'equitable' in the sense that they may have failed to comply with some requirement for establishment of a 'common law' lien, but are recognized and enforced in the courts of equity.

1 Dobbs § 4.3(3) at 601 (footnote omitted).

Just as with the forms of equitable restitution discussed above, however, an equitable lien by express agreement has specific conditions that equity attached to its provision. And, just as with the remedies discussed above, those conditions are not satisfied here:

> [C]reation of an equitable lien by agreement requires that "the property or fund sought to be charged be distinctly appropriated to, or as security for, the payment of the debt or other liability in question." 51 Am. Jur. 2d Liens §29 (1970). "The promisor must place the fund beyond his control and grant to the promisee a complete and present right therein..." *Id.* An equitable lien requires "more than a mere expectation, or even an agreement, that a debt

---

way. Where the constructive trust gives a complete title to the plaintiff, the equitable lien only gives him a security interest in the property, which he can then use to satisfy a money claim." 1 Dobbs § 4.3(3), at 601 (footnote omitted) (emphasis added).

> will be paid out of a particular fund," *id.*, and "more than a mere promise by a debtor to pay a debt out of a particular fund due him, as soon as he receives it." *Id.*

Note, *Adding Insult to Injury, ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214, 1235 (2005). (hereinafter, "*Adding Insult to Injury*");

> In a reimbursement action, at the time the policyholder agrees to the plan terms or accepts medical benefits from the plan, she possesses no third-party recovery which she can appropriate to the plan; the most she can offer to the plan is her promise to repay if and when she later obtains recovery. Such a promise might support a contract claim, but cannot support an equitable lien by express agreement.[13]

Id; see also Taylor v. Wharton, 43 App. D.C. 104, 1915 WL 20927 (App. D.C. Feb 01, 1915) (distinguishing *Barnes v. Alexander*—the case cited by MAMSI—on this basis).

---

[13] "Such a lien is a right over the thing with which the contract deals, by means of which the obligee is "enabled to follow the identical thing" to which the lien attaches and enforce the obligation by a remedy which operates directly upon that thing. Therefore, in order that it may arise, the agreement must deal with some specific property, such as a tract of land or particular chattel or securities, and identify it or so describe it that it can be identified." *Bassett v. City Bank & Trust Co.*, 165 A. 557, 561 (1933) (citing 3 Pomeroy's Equity Jurisprudence (4th Ed.) §§ 1234, 1235, pp. 2961, 2964).

MAMSI may argue that the Reimbursement Award is authorized by § 502(a)(3) because MAMSI has asserted an implied-in-fact equitable lien. An implied-in-fact equitable lien, however, was not typically available in equity. To the contrary, a court of equity would only intervene to imply a lien when an intended contractual lien could not be enforced at law because of some technical defect. 1 Dobbs § 4.3(3), at 601.

There is no suggestion in this case, however, that MAMSI's reimbursement provision is somehow legally deficient. As such, any claim to an implied-in-fact equitable lien would rest entirely on the grounds that MAMSI had no adequate remedy at law by which to enforce its contractual rights.[14] Permitting relief under § 502(a)(3) on that basis presents the precise problem identified by this Court in *Knudson*—"it renders the statute's limitation of relief to '[injunction] ... or other appropriate equitable relief' utterly pointless." *Knudson*, 534 U.S. at 216. Put differently, if the mere unavailability of damages elsewhere could bring the same relief within § 502(a)(3), the Congressional rejection of a damages remedy under the statute, as established by this Court, would be reversed.

---

[14] The premise of this argument has not remotely been established. *See e.g. Comment, Legal Reimbursement Claims by ERISA Plan Fiduciaries*, 72 U. Chi L. Rev. 103 (2005) (arguing that ERISA does not preempt a state law breach of contract claim by an ERISA plan fiduciary against a beneficiary because such a claim for reimbursement is not a claim for benefits).

2. Subrogation.

In its Opposition, MAMSI also notes that:

> As the Court has consistently affirmed for over a century, "'The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.'" *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 137 n.12 (1962) (quoting *Memphis & L.R.R. Co.* v. *Dow*, 120 U.S. 287, 301-302 (1887)).

BIO at 14.[15]

To be clear: what MAMSI has asserted in this case is *not* a subrogation claim. Black's Law Dictionary defines "subrogation" as "[t]he principle under which an insurer

---

[15] It bears mention that:

> at common law, subrogation was not permitted on personal injury claims. A personal injury claim could not be "assigned" at common law and, therefore, efforts to have subrogation on personal injury claims ran afoul of this principle. The effort to seek subrogation on personal injury claims also violated the common-law prohibition against splitting a cause of action. The existing practice of permitting subrogation on property damage claims had been tolerated as an exception to this prohibition, but historically, courts were unwilling to permit an exception in the area of personal injury claims.

Roger M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement To ERISA Plans: It's Time To Recognize The Elephant In The Courtroom*, 55 Mercer L. Rev. 595, 613 (2004) (footnotes omitted) (hereinafter, "Reimbursement to ERISA Plans").

that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured *against a third party* with respect to any loss covered by the policy." Black's Law Dictionary, 7th Ed., at p. 1440 (emphasis added).

Similarly, Dobbs provides that "[s]ubrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant." 1 Dobbs, § 4.3, at 404. It is clear, therefore, that while the principle of subrogation would have allowed MAMSI to "stand in the shoes" of the Sereboffs and pursue a claim against the third party tortfeasors for the loss that MAMSI covered, the same principle does not allow MAMSI to pursue a claim against its own insured. *Qualchoice v. Rowland*, 367 F.3d 638, 649-50 (CA6 2004) ("subrogation is not available in a situation such as this, when the plan participant or beneficiary has already recovered, because subrogation allows a plan fiduciary only to step into the shoes of a plan participant or beneficiary and assert the rights of the participant or beneficiary against another; subrogation does not allow a plan fiduciary to obtain a judgment of personal liability against a plan beneficiary or participant").

MAMSI was invited to join in the Sereboffs' lawsuit against the third party tortfeasors and, had it intervened in that lawsuit, could have asserted its rights, under a principle of subrogation, against these tortfeasors for the loss covered by MAMSI. What MAMSI now asserts—although often referred to as a "subrogation" right to

reimbursement—is a right that is based entirely on its contract with the Sereboffs. Such a right was not "typically available in equity."

D. Even If It Constitutes "Equitable Relief," the Reimbursement Award Is Not "Appropriate".

As this Court has confirmed, § 502(a)(3) requires that any relief awarded be not only "equitable" but "appropriate" as well:

> In *Varity Corp*, we explained that § 502(a)(3) is a "'catchall' provisio[n]" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.". . . . In *Varity Corp* [] it was undisputed that respondents were seeking *equitable* relief, and the question was whether such relief was "appropriate" in light of the apparent lack of alternative remedies.

Knudson, 534 U.S. at 221 n.5 (citing *Varity Corp. v. Howe*, 516 U.S. 489, 507-15 (1996).[16]

The argument was advanced in *Knudson* that the contractual reimbursement claim at issue did not seek "*appropriate* equitable relief" because any

---

[16] The Court went on to make clear that "*Varity Corp.* did not hold [] that § 502(a)(3) is a catchall provision that authorizes *all* relief that is consistent with ERISA's purposes and is not explicitly provided elsewhere" because to accept such a position "is to ignore the plain language of the statute, which provides fiduciaries with only equitable relief." *Id.*

reimbursement lawsuit brought by a plan under § 502(a)(3) necessarily results in harmful duplicative state and federal court litigation that is unnecessary to protect plan interests. *See* Brief of *Amicus Curiae* in Support of the Judgment Below by Invitation of the Court, 2001 WL 740878, at 39-50. Because the Court concluded that the relief sought was not "equitable," it did not pass on the merits of this argument or the validity of its underlying premises:

> We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. . . .
>
> We need not decide these issues because, as we explained in *Mertens*, "[e]ven assuming ... that petitioners are correct about the pre-emption of previously available state-court actions" or the lack of other means to obtain relief, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. . . . Because petitioners are seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money—502(a)(3) does not authorize this action.""

Knudson, 534 at 220-21.

While the Sereboffs certainly agree with the broad position advanced by appointed counsel in *Knudson*, there is no need to discuss it in any detail here.[17] For the reasons explained below, even if *some* awards of reimbursement are "appropriate" under 502(a)(3), the Reimbursement Award in this case certainly was not.

If this Court concludes that the lawsuit filed in this case seeks "equitable relief," then it has necessarily adopted some version of MAMSI's argument that:

> [T]he basis of the plans' claims is clearly equitable. The mere fact that the plan fiduciaries "may also have a right to recover from [the plan participants] for breach of contract does not alter the equitable nature of the suit. . ." [ ] "'The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice. . ." [and] driven by the fundamentally equitable desire

---

[17] It is worth noting, however, that "ERISA does not require or even endorse the idea of reimbursement. The device of 'reimbursement' only recently evolved as an alternative method for an insurer to secure money in situations when an insurer might have a subrogation interest but otherwise would be precluded from recovery. In that regard, the prospect of subrogation in the area of medical expense claims (and the corresponding tool of 'reimbursement') is of relatively recent origin, having only been developed in the last thirty to forty years." Baron, *Reimbursement To ERISA Plans*, 55 Mercer L. Rev. 595 (footnotes omitted)

> ***to prevent unjust enrichment, rather than to make the insurer whole through breach-of-contract damages. . . .***"

BIO at 14 (citations omitted) (emphasis added). This view of "equitable relief," however, cannot be reconciled with the actual Reimbursement Award requested by and granted to MAMSI, through which MAMSI sought to be made whole, irrespective of whether such an award truly represented the prevention of the Sereboffs' unjust enrichment.

The position taken by MAMSI in the district court was that no determination need be made of whether, and to what extent, the Sereboffs' tort recovery actually constituted payment for past medical expenses and which, therefore, would constitute an unjust enrichment:

> [T]he Plan terms not only do not incorporate the make whole rule, but rather, specifically disclaim it by stating that "[t]he Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction." The make whole rule, therefore, does not apply here.

JA 53 (citing *In re Paris*, No. 99-1558, 2000 U.S. App. LEXIS 6883 (4th Cir. Apr. 17, 2000) for the proposition that "common law make whole rule does not apply when it overrides plan terms")).

The district court agreed; *see, e.g.*, JA 67 ¶4 ("the Plan provides for 100% reimbursement from Plan participants and their beneficiaries as set forth above [referring to the make-whole disclaimer]"). As a result, no determination has ever been made that any of the $750,000 recovered by the Sereboffs was compensation for past medical expenses that were paid by MAMSI and which, therefore, represent an unjust enrichment which has accrued to the Sereboffs.

The logic employed in granting the Reimbursement Award would permit plan fiduciaries to include provisions that authorize the reimbursement of all medical expenses paid on a beneficiary's behalf out of legitimate personal injury settlements, *regardless* of what these settlement payments were actually intended to compensate. This will have devastating consequences to those victims of catastrophic injury: "In the vast majority of such cases, due to liability insurance policy limits or lack of resources, these victims will never recover from the tortfeasor a settlement which fully compensates them for their damages." Baron, *Reimbursement To ERISA Plans*, 55 Mercer L. Rev. at 631.

It strains credulity to suggest that such relief is "appropriate." This Court should not endorse a rule that would encourage a *fiduciary* to explicitly disclaim doctrines that have served to protect beneficiaries so that, at the end of the day, the *fiduciary* is made whole at the expense of its beneficiary who is left "in part." *See id.* (arguing that "Congress has indicated that the goal of full and just compensation for employees and their beneficiaries should carry a higher priority than the goal of

strictly upholding plan documents as unilaterally drafted and amended by ERISA plans.").

CONCLUSION

For the above reasons, Petitioners respectfully request that this Court reverse the judgment of the court of appeals.

DATE: January 19, 2006

Respectfully Submitted,

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110

PETER K. STRIS
Counsel of Record
Radha A. Pathak
WHITTIER LAW SCHOOL
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141; x 460

WILLIAM DELGADO
JASON H. WILSON
WILLENKEN WILSON
LOH & LIEB LLP
707 Wilshire Blvd.
Los Angeles, CA 90017

JOHN C. STEIN
THE BOCCARDO LAW FIRM LLP
111 W. St. John St.; Ste. 400
San Jose, CA 95113

ALISON L. LACROIX
SAMUEL I. GOLIEB FELLOW
IN LEGAL HISTORY
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 WASHINGTON SQUARE SOUTH
NEW YORK, NY 10012